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No. 08-357

In the Supreme Court of the United States

SAMUEL R. HOGSETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment rights by limiting his cross-examination of a government witness.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Bui v. *DiPaolo*, 170 F.3d 232 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000) 7

Delaware v. *Fensterer*, 474 U.S. 15 (1985) 7

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 6, 7, 8, 9

Henry v. *Speckard*, 22 F.3d 1209 (2d Cir.), cert. denied, 513 U.S. 1029 (1994) 9, 10

Searcy v. *Jaimet*, 332 F.3d 1081 (7th Cir. 2003), cert. denied, 540 U.S. 1192 (2004) 11

Taylor v. *United States*, 129 S. Ct. 190 (2008) 5

United States v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980) 9, 10

Constitution and statutes:

U.S. Const.:

Amend. VI (Confrontation Clause) 6

18 U.S.C. 922(g)(1) 1

18 U.S.C. 924(c) 2

18 U.S.C. 924(e) 1

Statutes—Continued: Page

21 U.S.C. 841(a)(1) 2
28 U.S.C. 2254 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 522 F.3d 731.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2008. A petition for rehearing was denied on June 30, 2008 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on September 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (Count 1); one count of possessing

cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2); and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Count 3). He was sentenced to 355 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-11a.

1. On July 16, 2005, petitioner and Tyesha Ford were driving through East Alton, Illinois. Gov't C.A. Br. 4. Police Officer Christian Cranmer stopped petitioner's car for a traffic violation. *Ibid.* During the stop, petitioner consented to a search of his car. *Ibid.* Officer Cranmer found two baggies of crack cocaine and a gun in the car. *Ibid.*

A superseding indictment charged petitioner with being a previously convicted felon in possession of a firearm; possessing cocaine with intent to distribute it; and possessing a firearm in furtherance of a drug trafficking crime. Gov't C.A. Br. 4.

2. At trial, outside the presence of the jury, petitioner's counsel offered a "Motion in Limine/Offer of Proof" with respect to witness Ford. 1/10/07 Tr. 2 Counsel sought to cross-examine Ford "as to what the defense believe[d] to be benefits that may have been received by Ms. Ford" during the pendency of the case against petitioner. *Ibid.* Counsel suggested that Ford might have had state misdemeanor warrants against her recalled or quashed after Ford talked to the federal prosecutor about petitioner's case. *Id.* at 2-7. Government counsel responded that the federal government "had no involvement in these warrants [or] the quashing of them." *Id.* at 7. He added, "as an officer of the Court," that the government "had nothing to do, nor * * * promised any benefits or anything with relationship" to the matters involving Ford. *Id.* at 8.

On the basis of the parties' arguments, the district court indicated that it was inclined to deny petitioner's motion because there was not a sufficient basis for the proposed questions. 1/10/07 Tr. 11-12. Before ruling on the motion, however, and in an abundance of caution, the district judge decided to talk to Ford outside the presence of the jury. *Id.* at 10. Ford was sworn as a witness, and the court proceeded to question her about the state warrants. *Id.* at 13. Ford testified that she knew nothing about one warrant against her that was recalled. *Id.* at 15. For two other warrants, she received new court dates. *Id.* at 16. Petitioner's counsel and government counsel then cross-examined her. *Id.* at 17-23. Ford said that she had told Agent Heiser that she had two outstanding warrants and that Agent Heiser told her that she would have to "clear that up" before testifying in petitioner's case. *Id.* at 22-23. In response to a follow-up question from the court, Ford testified that Agent Heiser had not told her that he would take care of the warrants for her. *Id.* at 23.

The court then questioned Agent Heiser. 1/10/07 Tr. 23-26. The court asked Agent Heiser whether he had "made any agreement with [Ford] or indicated to her that if she cooperates with the Government, that [he] would try to get the Madison County authorities or the Alton Police Department to take steps to dismiss these matters." *Id.* at 25. Agent Heiser responded, "Absolutely not." *Ibid.* The prosecutor subsequently asked Agent Heiser whether he had ever promised any benefit to Ford, and again Heiser responded, "Absolutely not." *Id.* at 28.[1]

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[1] Agent Heiser did indicate that he spoke to Officer Paletto of the Alton Police Department about Officer Paletto's need to take care of

After hearing from Ford and Agent Heiser, the district court denied petitioner's motion in limine, explaining that the court had "not seen or heard any evidence of an actual attempt to offer * * * this witness, Tyesha Ford, any benefit or * * * inducement." 1/10/07 Tr. 29. The judge added that he did "not believe there is sufficient [evidence] here to support [petitioner's] Motion, and I deny it. I'm not going to allow an inquiry into these two warrants and their suspension." *Id.* at 29-30.

At the conclusion of the four-day jury trial, petitioner was convicted on all three counts. Pet. C.A. Br. 3; Gov't C.A. Br. 3. He was sentenced to 295 months of imprisonment on the felon-in-possession count, to run concurrently with a 240-month term on the drug trafficking count, and to run consecutively with a 60-month term on the Section 924(c) count, for a total of 355 months of imprisonment. Judgment 2; Gov't C.A. Br. 3. He was additionally sentenced to five years of supervised release and was ordered to pay a $750 fine and a $300 special assessment. Gov't C.A. Br. 3.

3. The court of appeals affirmed in a single opinion that addressed two different appeals from unrelated cases that presented overlapping issues. Pet. App.

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the warrants (for example, by arresting Ford if he needed to do so), but that Agent Heiser could not be involved. 1/10/07 Tr. 24. According to Agent Heiser, Officer Paletto stated that he would reschedule the first warrant. *Ibid.* With regard to the other warrants, Agent Heiser stated that he spoke to Officer Paletto and that Officer Paletto said that he had contacted the clerk's office, which, upon learning that Ford's address had changed, reset a new court date. *Id.* at 24-25. Agent Heiser did not state that Ford was made aware of his conversations with Officer Paletto, and no evidence supports the conclusion that she was aware.

1a-11a.[2] As relevant here, petitioner argued that the district court erred in failing to allow him to cross-examine Ford about the outstanding state warrants that had been quashed before his trial. *Id.* at 10a-11a. The court of appeals explained that the district court had announced its evidentiary ruling after the witness had testified during voir dire "that she did not know why the warrants had been quashed"; a federal investigator had "testified that he had neither promised to help [the witness] get them quashed nor done anything to get them quashed"; and "the prosecutor assured the judge on the record that the federal government had had no involvement with the warrants." *Id.* at 10a.

Under those circumstances, the court of appeals held that the district judge "did not abuse his discretion in barring" the line of questioning that petitioner's counsel sought to pursue. Pet. App. 11a. The court of appeals explained that an attorney is "not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful." *Ibid.* Indeed, as the court of appeals noted, the district court was required to disallow the line of questioning "when the hearing revealed the shot-in-the-dark nature of the proposed cross-examination." *Ibid.*

4. In a petition for rehearing, petitioner renewed his argument that he had a good-faith basis to inquire about Ford's potential bias. Pet. for Reh'g 10-14. Petitioner acknowledged "that trial counsel must have a good faith factual basis to cross-examine a witness about a matter." *Id.* at 10. Petitioner, however, claimed that "counsel was able to articulate a reasonable suspicion based upon

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[2] This Court denied the petition for a writ of certiorari filed by the defendant in the other case. *Taylor* v. *United States*, 129 S. Ct. 190 (2008).

an objective factual predicate—his good faith basis—as to why Ms. Ford was potentially biased against" petitioner. *Id.* at 13. According to petitioner, the court of appeals' opinion "disregard[ed] the important distinction between a good faith basis for asking a question, on the one hand, and the existence (or not) of witness bias resulting from favorable treatment, on the other." *Id.* at 14. Based on the district court's alleged error in not allowing petitioner to cross-examine Ford about her alleged bias, petitioner contended that his convictions on Counts 2 and 3 (but not Count 1) should have been reversed. *Ibid.* The court of appeals denied the petition for rehearing. Pet. App. 17a-18a.

ARGUMENT

Petitioner contends (Pet. 8-23) that the court of appeals erred in holding that the district court did not violate his rights under the Confrontation Clause by limiting his cross-examination of Ford. He argues that the decision of the court of appeals is in conflict with a decision of this Court and with the decisions of two other courts of appeals. Those claims lack merit and do not warrant review by this Court.

1. The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such

cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); see *Bui* v. *DiPaolo*, 170 F.3d 232, 242 (1st Cir. 1999) ("The threshold requirement imposed by the Confrontation Clause is satisfied as long as the defendant is given a fair chance to inquire into a witness's bias. A criminal defendant is not regarded as being deprived of that chance if a trial court legitimately determines that his cross-examination is inappropriate." (citations omitted)), cert. denied, 529 U.S. 1086 (2000).

Petitioner contends (Pet. 8-12) that the court of appeals' ruling that the district court did not abuse its discretion in barring questioning about the witness's quashed warrants conflicts with this Court's decision in *Van Arsdall*. Petitioner's contention lacks merit and does not warrant this Court's review.

In *Van Arsdall*, the witness acknowledged that a charge against him "had been dropped in exchange for his promise to speak with the prosecutor" about the crime in question. 475 U.S. at 676. The Court held that a violation of the Confrontation Clause occurred because "the trial court prohibited all inquiry into the possibility that [the prosecution witness] would be biased as a result of the State's dismissal of his pending * * * charge." *Id.* at 679. The Court explained that by cutting off inquiry into "an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecu-

tion in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." *Ibid.*

In the present case, by contrast, petitioner concedes that there was no such evidence of a quid pro quo between the witness and the prosecution. Pet. 9. In the absence of such evidence, the direct holding of *Van Arsdall* has no application.

Petitioner attempts to circumvent the lack of evidence of a quid pro quo between the witness and the prosecution by suggesting that the voir dire of the witness in question "adduced evidence from which a reasonable jury might draw the inference that the witness's testimony was colored by a perceived quid pro quo." Pet. 9. That claim, however, is both speculative and fact-intensive, and thus does not present a legal question warranting this Court's review. In any event, a judge has latitude to exclude evidence that is at best "marginally relevant," *Van Arsdall*, 475 U.S. at 679, and the speculative inference that petitioner identifies falls into that category. Ford testified that she was unaware that one warrant was recalled (1/10/07 Tr. 15) and that she rescheduled her court date on the other warrants by speaking with the clerk after being advised by Officer Paletto to do so (*id.* at 16). No evidence supports the conclusion that she perceived receiving a benefit in those cases as a result of her testifying in petitioner's case.[3]

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[3] Petitioner claims that the alleged "violation of [his] Sixth Amendment rights cannot be said to be harmless error" (Pet. 10), but the court of appeals did not reach that issue because it found no error at all. For the same reason, there is no occasion for this Court to consider any issue of harmlessness. In any event, because the probative value (if any) of petitioner's line of questions was so weak, the denial of cross-examin-

2. Petitioner further contends (Pet. 13-23) that the standard used by the court of appeals in determining that there was no "good-faith basis" (Pet. App. 11a) for the line of cross-examination that petitioner sought to pursue "directly conflicts with the standards used by other circuits." Pet. 14. Again, petitioner's claim is unavailing.

In support of his alleged claim of conflict, petitioner cites (Pet. 14, 18) two cases from other courts of appeals. See *Henry* v. *Speckard*, 22 F.3d 1209 (2d Cir.), cert. denied, 513 U.S. 1029 (1994); *United States* v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (per curiam). Those cases do not create a circuit conflict.

Henry arose on a habeas petition under 28 U.S.C. 2254, and the State did "not dispute * * * that the trial court's refusal to permit Henry's counsel to question" a witness on a matter that could reflect on the potential bias of the witness "was error." *Henry*, 22 F.3d at 1214; see *id.* at 1215 (citing *Van Arsdall*, 475 U.S. at 680). In *Henry*, the issue was whether the defense could ask a witness whether she harbored resentment from being asked to baby-sit. There was no dispute that she had baby-sat; the issue was whether the witness could be asked about feelings of resentment even though she had denied such feelings in a proffer. *Ibid.* The court held that "[t]he witness may well answer bias-probing questions in the negative; but the matter of whether her answers should be believed or disbelieved is within the sole province of the jury." *Ibid.* Here, in contrast, there was no factual predicate that Ford either received a benefit or perceived that she did; accordingly, the purported

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ation was harmless beyond a reasonable doubt. See *Van Arsdall*, 475 U.S. at 584 (recognizing that harmless-error review applies to Confrontation Clause violations).

bias-probing questions would have required the jury to spectate about the underlying events that supposedly produced the bias. In any event, the Second Circuit concluded that the trial court's error was harmless, determining "in light of the evidence that was in fact elicited, that the unavailability of the evidence that could have been realized through the proposed questioning" did not have "any substantial influence on the jury's conclusion that * * * Henry was guilty." *Id.* at 1216.

In *Sampol*, the D.C. Circuit said that a factual basis is not required for all cross-examination: "[a] well reasoned suspicion that a circumstance is true is sufficient." 636 F.2d at 658. The court went on to say that "counsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness." *Ibid.* Although petitioner claims that even the higher "reasonable basis" standard set forth in *Sampol* for incriminating questions is "substantially lower" (Pet. 18) than the "good-faith basis" test employed by the court of appeals below (Pet. App. 11a), nothing in *Sampol* supports petitioner's claim. Indeed, the *Sampol* opinion emphasized that asking incriminating questions requires "some facts which support a genuine belief that the witness committed the offense." 636 F.3d at 658 (citation omitted). The difference between the "reasonable basis" and "good-faith basis" tests thus appears to be a matter of semantics, not a substantively different threshold for the admission of evidence. Petitioner makes no showing that the linguistic differences in the standards applied by the courts of appeals have produced conflicting results. Indeed, in both this case and *Sampol*, the evidence in question was excluded by the district court and the court of appeals affirmed.

Petitioner instead relies on a dissenting opinion in another Seventh Circuit case to support his argument that a defendant should be allowed to cross-examine a witness on a speculative theory of bias even after the trial court has conducted a hearing and determined that there is no basis for the proposed line of questioning. Pet. 18-21 (discussing *Searcy* v. *Jaimet*, 332 F.3d 1081, 1092-1094 (7th Cir. 2003) (Cudahy, J., dissenting), cert. denied, 540 U.S. 1192 (2004)). To the extent the *Searcy* dissent provides any support for petitioner's argument, that view was rejected by the majority in that case, and it has not been endorsed by any other court of appeals. Accordingly, there is no conflict warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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